No. 91-990

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DALE FARRAR, *et al.*,
Petitioners,

v.

WILLIAM P. HOBBY, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, NATIONAL ASSOCIATION OF COUNTIES, U.S. CONFERENCE OF MAYORS, AND COUNCIL OF STATE GOVERNMENTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a plaintiff who recovers only a nominal damage award in an action in which the sole relief sought is $17 million in monetary damages is a "prevailing party" entitled to attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. The decision in this case will have a significant impact on the financial exposure of city and state governments and officials resulting from litigation under the civil rights

laws. *Amici* submit that an award of attorney's fees under Section 1988 to a plaintiff who recovers none of the relief that he sought—merely because of an abstract finding that plaintiff was deprived of an unspecified civil right—is contrary to Congress' intent and fundamentally unfair. *Amici* accordingly submit this brief to assist the Court in its resolution of this case.[1]

STATEMENT

1. In the early 1970s, Joseph D. Farrar and his son, Dale L. Farrar, owned and operated Artesia Hall, a school in Liberty County, Texas for the care of delinquent, handicapped, and disturbed teenage children. Pet. App. A4. After the death of an Artesia Hall student in 1973, a Liberty County grand jury returned a murder indictment against Joseph Farrar, charging him with willfully failing to administer proper medical treatment to the student and failing timely to provide for her hospitalization. *Id.* at A31. Upon learning of the situation, respondent William Hobby, then Lieutenant Governor of Texas, publicly demanded an investigation of Artesia Hall. *Id.* at A32. The State of Texas thereafter obtained an injunction that required the closing of Artesia Hall. *Id.*

In June 1975, after the murder indictment against Joseph Farrar had been dismissed, the Farrars filed this action under 42 U.S.C. § 1983 against Hobby, two elected officials of Liberty County, a judge, and three state employees. Pet. App. A32. The Farrars claimed that Hobby and the other defendants had violated their civil rights by, among other things, malicious prosecution aimed at closing the school, and had conspired to deprive them of their civil rights, livelihoods, and professional reputations. *Id.*

Initially, the Farrars sought both monetary damages and injunctive relief. *Id.*; Resp. Br. Opp. 1. They later

[1] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.3 of the Court.

amended their complaint to omit the prayer for injunctive relief. J.A. at 33. The amended complaint states that their suit was brought

> for money damages only. No injunctive relief is now herein sought, nor would such now serve any useful purpose.

Id. In this complaint, the Farrars increased their prayer for monetary relief from $2.7 million to $17 million. *Id.* at 33; Pet. App. A32.

In 1983, the case was tried to a jury. Pet. App. A15. Although the Farrars sought $17,000,000 in damages, "the jury found no damages" and did not award the Farrars anything. Pet. App. A31. The jury did find that respondent Hobby had "committed an act or acts under color of state law that deprived Plaintiff Joseph David Farrar of a civil right guaranteed by the Constitution and laws of the United States and the State of Texas." Resp. App. A3. It also found, however, that the act or acts of respondent Hobby were not a proximate cause of any damages to the Farrars. *Id.* at A1-A4. Based upon these findings, the district court ordered "that plaintiffs take nothing, that the action be dismissed on the merits, and that the parties bear their own costs." *Id.* at A5-A6.[2]

The court of appeals affirmed in part, reversed in part, and remanded. Pet. App. A2-A11. It rejected the Farrars' challenge to the various jury instructions made by the district court. *Id.* at A4-A9. It also held, however, that, "[b]ecause the jury explicitly found that defendant Hobby had violated Farrar's civil rights, the jury should have awarded Farrar nominal damages, not to exceed one dollar, and it was error for the trial court not

[2] The record does not identify the civil right found to have been violated by Hobby. As the district court noted, "the jury instructions made it difficult to discern exactly what the jury found." Pet. App. A15.

to do so when the Farrars so moved in their motion for a new trial." *Id.* at A10. The court of appeals therefore remanded the case to the district court "for the entry of nominal damages against [Hobby]." *Id.* at A33.

2. On remand, the district court entered a judgment for nominal damages. Pet. App. A31. Then, after reviewing this Court's analysis of the "prevailing party" standard in *Texas State Teachers Ass'n v. Garland Independent School District*, 489 U.S. 782 (1989), the court ruled that "[t]he award of nominal damages meets the test announced in *Garland*." Pet. App. A19. The district court thereupon ordered respondent Hobby to pay the Farrars $280,000.00 in attorney's fees, $27,932.00 in costs, and $9,730.00 in prejudgment interest. *Id.* at A12.

3. On appeal, the Fifth Circuit reversed. Pet. App. A30-A45. The court reviewed the relevant authorities from this Court and concluded that, "to qualify as a prevailing party, a plaintiff must show that he won at least some relief from the defendant, that the outcome of the suit changed the legal relationship between the parties, and that the plaintiff's success was not a *de minimis* or technical victory." *Id.* at A38. The court of appeals held that "the Farrars were *not* prevailing parties for the purposes of § 1988." *Id.* It based this holding on the fact that the Farrars had been awarded none of the relief they sought in their lawsuit; as the court explained,

> The Farrars sued for $17 million in money damages; the jury gave them nothing. No money damages. No declaratory relief. No injunctive relief. Nothing.

Id.

SUMMARY OF ARGUMENT

Congress enacted Section 1988 in response to this Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), which held that attorney's fees may not be shifted without express statutory authorization. In enacting Section 1988, Congress intended to provide such express authorization in civil rights cases and to promote vigorous enforcement of modern civil rights legislation. At the same time, however, Congress was concerned that Section 1988 not be treated as a "food-stamp" bill for lawyers, or be applied so as to encourage "trivial" suits or to create "windfalls" for attorneys. To accomplish these competing goals, Congress chose the "prevailing party" standard.

The Court has long recognized that the "prevailing party" standard is a "permissive and discretionary" one that is not subject to a mechanical construction and that must be interpreted in keeping with Section 1988's competing policies. Thus, the Court has held that a prevailing defendant is not entitled to a fee award unless the plaintiff's action is "frivolous, unreasonable, or without foundation." Out of respect for the statutory language and the countervailing policy concerns of Congress, the Court has also held, however, that a mere favorable finding of fact or the entry of judgment in a plaintiff's favor is not a sufficient basis for attorney's fee shifting for the plaintiff. Rather, the Court has held that achievement of a material aspect of the relief sought in the complaint is necessary for an award of fees to a prevailing plaintiff; achievement of a "technical" or "*de minimis*" success is not enough to establish "prevailing party" status.

The court below correctly concluded that a civil rights plaintiff who claims entitlement to extensive monetary relief but receives only a nominal damage award has not crossed the statutory threshold for a fee award identified in this Court's decisions. That conclusion finds rich support in analogous cost and fee-shifting laws and practices.

Despite their willingness to allow fee-shifting in all civil cases, the English developed a rule disallowing all costs and fees to plaintiffs who recover only nominal or trivial relief on claims for extensive monetary relief. This historic practice has been followed in the United States with respect to cost-shifting provisions such as Rule 54(d) of the Federal Rules of Civil Procedure. The historic practice has also been followed in a variety of contemporary attorney's fees statutes.

There is nothing in the language or legislative history of Section 1988 to suggest that Congress intended to depart from this historic and widespread practice of denying costs and attorney's fees to nominal or pyrrhic victors. On the contrary, at the time Section 1988 was enacted, it was well established that a "trivial success on the merits" was not sufficient to support the shifting of attorney's fees. Moreover, the legislative history of Section 1988 indicates that Congress understood itself only to be authorizing courts to recommence the discretionary fee-shifting practices in which they had engaged prior to the *Alyeska* decision, and those practices included denying fees to nominal or pyrrhic victors. Indeed, the legislative history explicitly states that Congress did not want to encourage "trivial" lawsuits or create "windfalls" for attorneys, which is precisely the rationale for the historic practice that denies shifting of costs and fees to nominal or pyrrhic victors.

Contrary to the argument of petitioners and the American Bar Association ("ABA"), plaintiffs who obtain enforceable civil rights judgments are not necessarily "prevailing parties" within the meaning of Section 1988. This Court's decisions require that, in addition, such a plaintiff recover some material aspect of the relief sought in the complaint.

The decision in *Carey v. Piphus*, 435 U.S. 247 (1978), does not hold that nominal damage awards are always non-*de minimis* remedies. *Carey* holds only that, where

the violation of a constitutional right by its nature does not cause a compensable injury, nominal damages must be awarded in order that the right may be judicially established and vindicated. *Carey* does not even begin to address the question whether nominal damage awards may constitute *de minimis* relief in cases where extensive monetary damages were sought. Indeed, to have held that nominal damage awards in such cases may not be treated as *de minimis* relief would have contradicted centuries of practice. Since *Carey* purports to embrace the common law, it cannot reasonably be read to support such a contradiction.

Petitioners and their *amicus* object that, under this Court's decisions, the relative success of the plaintiff is relevant only to the amount of the fee awarded. But the Court's cases make it plain that the determination whether a "material alteration" has occurred in the relationship between a plaintiff and a defendant requires an evaluation of the "significance" of the plaintiff's success "in the context of th[e] litigation" as a whole.

Contrary to the argument of petitioners and the ABA, the "*de minimis* success" test applied by the court below does not focus on the mental state of the parties or promise to mire the district courts in unmanageable inquiries. Rather, the test focuses on the relief requested in the plaintiff's complaint and simply requires the district court to determine whether the plaintiff has obtained a material aspect of it. As the ABA concedes, this is an inquiry that this Court has long entrusted to the district courts.

Finally, there is no basis for the suggestion that denying "prevailing party" status to plaintiffs who receive only nominal damages in cases seeking extensive monetary relief is inconsistent with congressional intent. Doing so will not discourage lawyers from representing claimants in cases in which little or no damages are perceived

as recoverable. Cases in which lawyers have satisfied themselves that there is a reasonable basis for seeking extensive monetary relief are by definition not cases in which little or no damages are perceived as potentially recoverable.

ARGUMENT

A PLAINTIFF WHO RECOVERS ONLY A NOMINAL DAMAGE AWARD IN AN ACTION IN WHICH THE SOLE RELIEF SOUGHT IS $17 MILLION IN MONETARY RELIEF IS NOT A "PREVAILING PARTY" ENTITLED TO ATTORNEY'S FEES UNDER 42 U.S.C. § 1988

Petitioners' amended complaint makes it clear that they sought "money damages only" and that injunctive relief "would not serve any . . . purpose" in this case. J.A. 25. The jury found that petitioners were not entitled to any of the monetary relief sought in the complaint. Resp. App. A3-A4. The court of appeals ruled that petitioners were entitled to a nominal damage award in recognition of the constitutional infringement that the jury nonetheless found to have occurred. Pet. App. A10. But the court also concluded that petitioners' victory was sufficiently pyrrhic to prevent them from being considered "prevailing parties" entitled to attorney's fees under 42 U.S.C. § 1988. *Id.* at A38-A39. As demonstrated below, this conclusion is supported by the decisions of this Court interpreting 42 U.S.C. § 1988, centuries of practice and case law under analogous cost and fee-shifting rules, and important considerations of policy that were of concern to Congress when it enacted Section 1988.

A. A Plaintiff Must Recover Some Material Aspect Of The Relief Sought In The Complaint To Be A "Prevailing Party" Entitled To Attorney's Fees Under 42 U.S.C. § 1988

Section 1988 on its face provides that "[i]n any action or proceeding to enforce a provision of sections 1981, 1982, 1983, and 1986 of this title . . ., the court, in its

discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." The pertinent interpretive materials establish that a plaintiff is a "prevailing party" within the meaning of Section 1988 only if the plaintiff receives some material aspect of the relief sought in the complaint.

1. As this Court has repeatedly recognized, Section 1988 was enacted in 1976 in response to the Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). *E.g.*, *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). In *Alyeska*, the Court held that, in the absence of specific statutory authorization, tradition and historical practice in America require that each party bear responsibility for its own attorney's fees without regard to success in the suit. 421 U.S. at 271. In introducing Section 1988, Senator Tunney thus stated that

> [t]he Supreme Court's recent *Alyeska* decision has required specific statutory authorization if Federal courts are to continue previous policies of awarding fees under all Federal civil rights statutes. This bill simply applies the type of "fee-shifting" provision already contained in title II and VII of the 1964 Civil Rights Act to the other civil rights statutes which do not already specifically authorize fee awards.

121 Cong. Rec. 26806 (1975); *see also* S. Rep. No. 1011, 94th Cong., 2d Sess. 1 (1976).

In so authorizing fee-shifting in civil rights cases, Congress determined that "[a]ll of these civil rights laws depend heavily upon private enforcement, and fee awards have proven an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain." S. Rep. No. 1011, *supra* at 2. Congress found that "[i]n many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer." *Id.* Congress further found that such cases often "do not provide the prevailing plaintiff

with a large recovery from which he can pay his lawyer." 122 Cong. Rec. 33314 (1976) (statement of Sen. Kennedy). Congress thus viewed fee-shifting as necessary for "vigorous enforcement of modern civil rights legislation . . . ." S. Rep. 1011, *supra* at 4.

At the same time, however, Congress was concerned that Section 1988 not be treated as "a food-stamp bill for lawyers." 122 Cong. Rec. 35127 (1976) (statement of Rep. Jordan). The bill was "not intended to encourage groundless or frivolous litigation." *Id.* at 35124 (statement of Rep. Drinan). Nor was it intended to create "windfalls" for attorneys. H.R. Rep. No. 1558, 94th Cong., 2d Sess. 9 (1976); 122 Cong. Rec. 31474 (1976) (statement of Sen. Allen). On the contrary, Congress wanted only to compensate those parties who were successful in civil rights litigation, H.R. Rep. No. 1558, *supra* at 9, and at the same time to deter "trivial and specious law suits." *See* 122 Cong. Rec. 31792 (1976) (statement of Sen. Helms).

2. To accomplish these competing goals, Congress chose the "permissive and discretionary" prevailing party language. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978). As this Court has recognized, this language "does not even invite, let alone require, . . . a mechanical construction." *Id.* at 418. Indeed, the Court has stated that "[t]he terms of [the statute] provide no indication whatever of the circumstances under which either a plaintiff *or* a defendant should be entitled to attorneys' fees." *Id.* (emphasis in original). Rather, as the Court has recognized, the statutory language instructs that "equitable considerations" and historical practice should inform who shall receive awards of attorney's fees. *Id.* at 419; *accord* H.R. Rep. No. 1558, *supra* at 8 (statute leaves "the matter to the discretion of the judge, guided of course by the case law interpreting similar attorney's fees provisions"); 122 Cong. Rec. 35128

(1976) (statement of Rep. Jordan) ("have faith in your judges").

Pursuant to this statutory instruction, the Court has held that "a prevailing plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render an award unjust.'" *Hensley v. Eckerhart*, 461 U.S. at 429 (citations omitted). It has also held that a plaintiff may "prevail" through a settlement and need not obtain formal judicial relief in order to receive an award of attorney's fees. *Maher v. Gagne*, 448 U.S. 122, 129-30 (1980). And it has held that, in contrast to the generous treatment of prevailing plaintiffs but in keeping with the multifarious policies of Section 1988, a prevailing defendant may recover an award of fees only where a plaintiff's action is "frivolous, unreasonable, or without foundation." *Christiansburg Garment Co. v. EEOC*, 434 U.S. at 420-22.

On the other hand, out of respect for the statutory language and the countervailing policy concerns of Congress, the Court has also held that success on a significant issue in the litigation and achievement of a material aspect of the relief sought in the complaint are necessary for an award of fees to a plaintiff. *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791-92 (1989). Thus, in *Hanrahan v. Hampton*, 446 U.S. 754, 756-59 (1980), the Court held a favorable interlocutory ruling on appeal insufficient as a basis for awarding attorney's fees because such a ruling itself affords no relief to the plaintiff. Moreover, in *Hewitt v. Helms*, 482 U.S. 755, 759-60 (1987), the Court held that a plaintiff who has proven unconstitutional conduct nevertheless does not "prevail" within the meaning of Section 1988 when the defendant's qualified immunity precludes an award of damages to the plaintiff, reasoning that "the moral satisfaction of knowing that a federal court concluded that [plaintiff's] rights ha[ve] been violated" is not enough under the statute. *Id.* at 761-62. Similarly, in *Rhodes*

v. Stewart, 488 U.S. 1, 3-4 (1988), the Court held that, where a case has become moot before judgment, even the entry of a declaratory judgment is not sufficient to establish "prevailing party" status, since a judgment "will constitute relief, for purposes of § 1988 if, and only if, it affects the behavior of the defendant toward the plaintiff."

3. The Court summarized this understanding of the law in *Garland*. There, in "decid[ing] the proper standard for determining whether a party has 'prevailed' " for Section 1988 purposes, the Court unanimously held that a plaintiff establishes "prevailing party" status only "[i]f the plaintiff has succeeded on 'any significant issue in the litigation which achieved some of the benefit the parties sought in bringing suit.' " 489 U.S. at 791-92 (citation omitted).

In explaining this standard, the Court noted two important points which the lower courts must consider. *Id.* First, the Court ruled that, as a "floor" or "absolute limitation," the plaintiff must "at a minimum . . . be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Id.* at 792. "Beyond this," however, the Court ruled that "a technical victory may be so insignificant . . . as to be insufficient to support prevailing party status." *Id.* Hence, plaintiffs are deemed prevailing parties only when they have "prevailed on a significant issue in the litigation and have obtained some of the relief they sought." *Id.* at 793.

In *Garland*, the Court agreed that the plaintiffs' success in "materially alter[ing] the school district's policy" justified their being deemed to be prevailing parties. 489 U.S. at 793. However, the Court expressly noted that, had the *Garland* plaintiffs succeeded only on one of their constitutional claims characterized by the district court "as 'of minor significance,' " they would not have been "prevailing parties." *Id.* at 792. In the Court's judgment, such a minor success would be too "technical" or "*de minimis*" to justify "prevailing party" status. *Id.*[3]

B. A Plaintiff Who Seeks Extensive Monetary Relief But Receives Only A Nominal Damage Award Has Not Recovered A Material Aspect Of The Relief Sought In The Complaint

The court below concluded that a civil rights plaintiff who seeks extensive monetary relief but receives only a nominal damage award has not crossed the statutory threshold for a fee award identified in *Garland*. Stated differently, the court below concluded that a plaintiff who seeks extensive monetary relief but receives only a nominal damage award has not, as required by this Court's cases, recovered a material aspect of the relief sought in the complaint. This conclusion finds rich support in analogous cost and attorney's fee-shifting laws and traditions, and is necessary to effectuate the intentions of the Congress that enacted Section 1988.

1. In contrast to the prevailing practice in America, English courts have historically required the losing party in litigation to pay the victor's attorney's fees and costs. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717-18 (1967); Charles T. McCormick, *Counsel Fees and Other Expenses of Litigation As An Element of Damages*, 15 Minn. L. Rev. 619 (1931). However, in 1670, the English by statute developed a rule—sometimes called the "forty shilling" rule—which provided that costs and attorney's fees would not be shifted to the losing party where the plaintiff recovered "only trivial dam-

[3] The *Garland* plaintiffs prevailed in the district court on their claim that "the requirement that non-school hour meetings be conducted only with prior approval from the local school principal was unconstitutionally vague." 489 U.S. at 792. The *Garland* Court emphasized, however, that "[i]f this had been [plaintiffs'] only success in the litigation, we think it clear that this alone would not have rendered them 'prevailing parties' within the meaning of § 1988." *Id.*

ages." *Id.* at 619. English courts applied this rule to situations where only "small judgments [were] awarded upon large claims," such as in "many types of cases where a plaintiff succeeds in recovering merely nominal damages." Charles T. McCormick, *Handbook on the Law of Damages* at 94. The purpose of the rule was "to discourage plaintiffs from cumbering the courts with insubstantial and trivial claims . . . ." *Id. See also* 3 William Blackstone, *Commentaries* *400 (recognizing that the rule serves to "prevent . . . trifling and malicious actions . . . .").

While courts and legislatures in America generally declined to follow the English approach of shifting attorney's fees to the losing party, they embraced early on the rule that the prevailing party should recover "costs" from the losing adversary. McCormick, 15 Minn. L. Rev. at 620. However, as in England, the federal courts and at least two-thirds of the States refused to authorize such cost-shifting where a plaintiff had recovered only trivial damages. McCormick, *Handbook on the Law of Damages* at 94-95 (surveying the law of American jurisdictions). Thus, Dean McCormick was able to write in 1935 that "the plaintiff to-day can by no means invariably rely upon a judgment for nominal damages as a 'peg' for costs." *Id.* at 95.

In more modern times, courts applying Rule 54(d) of the Federal Rules of Civil Procedure have similarly declined to award costs to the victor in litigation "where the judgment recovered was insignificant in comparison to the amount actually sought." *Esso Standard v. S.S. Wisconsin*, 54 F.R.D. 26, 27 (S.D. Tex. 1971); *see also Howell Petroleum Corp. v. Samson Resources Co.*, 903 F.2d 778, 783 (10th Cir. 1990); *Lewis v. Pennington*, 400 F.2d 806, 819 (6th Cir.), *cert. denied sub nom. Pennington v. United Mine Workers*, 393 U.S. 983 (1968). This is consistent with the Rules' intention to retain the practice of denying costs to plaintiffs recovering less than $500. *See* 28

U.S.C. § 815 (repealed); *see also* Fed. R. Civ. P. 54 advisory committee note. Indeed, courts have even cited *Garland* as support for denying costs where a "recovery was 'nominal' when compared to the claims asserted by [the plaintiff]." *Northbrook Excess & Surplus Ins. Co. v. Proctor & Gamble*, 924 F.2d 633, 641-42 & n.11 (7th Cir. 1991).

This historic practice of denying "prevailing party" status to plaintiffs who obtain only nominal or pyrrhic victories has also been applied in a variety of contemporary attorney's fee-shifting statutes that limit awards to "prevailing parties." *See, e.g., Overland Dev. Co. v. Marston Slopes Dev. Co.*, 773 P.2d 1112, 1115-16 (Colo. Ct. App. 1989) (Colorado law); *Heindel v. Southside Chrysler-Plymouth, Inc.*, 476 So. 2d 266, 270 (Fla. Dist. Ct. App. 1985) (Florida law); *Jet Line Serv. v. American Employers Ins. Co.*, 537 N.E.2d 107, 115 (Mass. 1989) (Massachusetts law); *Dresselhouse v. Chrysler Corp.*, 442 N.W.2d 705, 711 (Mich. Ct. App. 1989) (Michigan law); *International Indus. v. United Mortgage Co.*, 606 P.2d 163, 167 (Nev. 1980) (Nevada law); *see generally* McCormick, *Handbook on Law of Damages* at 94 n.51 (cataloguing laws in existence in 1935); *cf.* Tex. R. Civ. P. 137 (denying cost awards in tort cases where less than $20 is recovered). As one court stated in denying attorney's fees to a litigant who had sought $175,000 but recovered only a nominal damage award, "the mere judicial declaration that one of the plaintiff's legal assertions is correct does not mean that he has prevailed in the litigation, unless some benefit flows, or may be anticipated to flow from that declaration." *Overland Dev. Co. v. Marston Slopes Dev. Co.*, 773 P.2d at 1115-16.

2. There is nothing in the language or legislative history of Section 1988 that indicates that Congress intended to depart from this historic practice of denying costs and attorney's fees to nominal or pyrrhic victors. The absence of such evidence should itself be sufficient to sustain such a historic and prevailing practice. *See Evans v. United*

States, No. 90-6105, slip op. at 4 (U.S. May 26, 1992); *Owen v. City of Independence*, 445 U.S. 622, 637 (1980). But there is also affirmative evidence that Congress intended to continue this practice under Section 1988.

First, the requirement in Section 1988 that the plaintiff be a "prevailing party" is inconsistent with awarding attorney's fees to nominal or pyrrhic victors. As this Court has noted in an analogous context, at the time Section 1988 was enacted, the term "prevailing party" "was thought not to extend to parties who prevailed only in part" and was understood to be more exacting than standards—such as "partially prevailing party"—used in other fee-shifting statutes. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 689 (1983). Indeed, at the time, it was clear that a "trivial success on the merits" was not sufficient to support the shifting of attorney's fees. *Id.* at 689 n.9. By definition, of course, a nominal damage award on a prayer for extensive monetary relief is such a "trivial" success on the merits. *See Chesapeake & Potomac Tel. Co. v. Clay*, 194 F.2d 888, 890 (D.C. Cir. 1952) ("The term nominal damages means a trivial sum—usually one cent or one dollar—awarded to a plaintiff whose legal right has been technically violated but who has proved no real damage."); McCormick, *Handbook on the Law of Damages* at 96. Congress' understanding of the existing state of the law controls "whether Congress correctly perceived the then state of the law" or not. *Brown v. GSA*, 425 U.S. 820, 828 (1976).

Second, as noted above, the legislative history of Section 1988 indicates that Congress understood itself only to be authorizing the courts to recommence the fee-shifting practices in which they had engaged in civil rights cases prior to this Court's *Alyeska* decision. *See* S. Rep. No. 1011, *supra*, at 4, 6; *see also* 122 Cong. Rec. 35117 (1976) (remarks of Rep. Railsback). Prior to *Alyeska*, courts had been following the tradition of denying fee requests where the amount recovered was insignificant or

de minimis in relation to the amount being sought. *See, e.g., Tatum v. Morton*, 386 F. Supp. 1308, 1318 (D.D.C. 1974); *Evans v. Sheraton Park Hotel*, 4 Fair Empl. Prac. Cas. (BNA) 1265, 1266 (D.D.C. 1972). Interpreting the statute to override this tradition would thus be inconsistent with Congress' stated intention of reauthorizing pre-*Alyeska* judicial fee-shifting practices.

Finally, as also noted above, the legislative history makes it plain that Congress intended for Section 1988 merely to compensate plaintiffs who had successfully vindicated significant civil rights claims; Congress did not intend to encourage "trivial" lawsuits or produce "windfalls" for attorneys. *See* 122 Cong. Rec. 31792 (1976) (statement of Sen. Helms); H.R. Rep. No. 1558, *supra* at 9. The traditional rule against cost and fee-shifting to nominal or pyrrhic victors is grounded in similar concerns. *See* McCormick, *Handbook on the Law of Damages* at 94. Thus, interpreting Section 1988 to authorize fee-shifting to nominal or pyrrhic victors would be at odds with Congress' stated intentions; "a windfall can be provided by awarding a fee where none is due as well as by overpayment where a fee is due." *Fast v. School Dist. of City of Ladue*, 728 F.2d 1030, 1037 (8th Cir. 1984) (en banc) (Henley, J., dissenting).[4]

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[4] For such reasons, many courts have correctly joined in the Fifth Circuit's view that Section 1988 does not authorize shifting of attorney's fees where the plaintiff has obtained only *de minimis* success in relation to the relief sought in the complaint. *See, e.g., Warren v. Fanning*, 950 F.2d 1370, 1375 (8th Cir. 1991); *New York City Unemployed and Welfare Council v. Brezenoff*, 742 F.2d 718, 724 n.4 (2d Cir. 1984); *Ohland v. City of Montpelier*, 467 F. Supp. 324, 349-50 (D. Vt. 1979); *see also Continental Web Press, Inc. v. NLRB*, 767 F.2d 321, 323 (7th Cir. 1985) (equating the entitlement standard under the Equal Access to Justice Act to Section 1988 and concluding that a plaintiff must recover "a substantial part of what he sought"). Indeed, many courts have joined the court below in holding that fee-shifting is not appropriate where a plaintiff obtains only nominal damages on a prayer for extensive monetary relief. *See, e.g., Lawrence v. Hinton*, 20 Fed. R. Serv. 3d

C. The Arguments Advanced In Favor Of According "Prevailing Party" Status To Plaintiffs Receiving Only Nominal Damages On Prayers For Extensive Monetary Relief Are Unsound

Petitioners and the American Bar Association ("ABA") advance a series of arguments concerning why plaintiffs who obtain nominal damage awards on prayers for extensive monetary relief should be deemed "prevailing parties." But these arguments are unsound.

1. Petitioners and the ABA (Pet. Br. 9-10, ABA Br. 8-11) first suggest that a plaintiff becomes a "prevailing party" simply by obtaining any enforceable civil rights judgment against the defendant. But the Court's decisions in *Hewitt* and *Rhodes* make it plain that the determination that the plaintiff's civil rights have been violated is not enough to establish "prevailing party" status. *See Hewitt v. Helms*, 482 U.S. at 761; *Rhodes v. Stewart*, 488 U.S. at 4. Moreover, the Court's decision in *Garland* makes it clear that an enforceable judgment is also not by itself sufficient to establish "prevailing party" status; *Garland* expressly holds that, to achieve "prevailing party" status, the plaintiff must achieve more than a *de minimis* or technical success in relation to the total relief sought in the lawsuit. *See* 489 U.S. at 792.

2. Petitioners and the ABA (Pet. Br. 8-10, 13-14; ABA Br. 6-8) next argue that this Court's decision in *Carey v. Piphus*, 435 U.S. 247 (1978), holds that nominal damage awards are always non-*de minimis* remedies in constitutional cases. *Carey*, however, holds only that,

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934 (4th Cir., July 12, 1991), *aff'g* 131 F.R.D. 659, 661-63 (M.D.N.C. 1990); *Carr v. City of Florence*, 729 F. Supp. 783, 791 (N.D. Ala. 1990), *aff'd without op.*, 934 F.2d 1264 (11th Cir. 1991); *see also Lewis v. Kendrick*, 944 F.2d 949, 955-56 (1st Cir. 1991) (denying fees where plaintiffs requested 140 times the amount recovered); *Moran v. Pima County*, 700 P.2d 881, 882-83 (Ariz. Ct. App.), *cert. denied*, 474 U.S. 989 (1985). *Cf. Northbrook Excess and Surplus Ins. v. Proctor & Gamble*, 924 F.2d at 641-42 & n.11.

where the violation of a constitutional right by its nature does not cause a compensable injury, nominal damages must be awarded in order that the right may be judicially established and vindicated. *See id.* at 266. *Carey* does not even begin to address the question whether nominal damage awards are *de minimis* remedies or not, much less hold that they never are. Indeed, as noted above (at 13-14, *supra*), to have so held would have been inconsistent with centuries of practice of denying cost and attorney's fee-shifting in many types of nominal damage award cases.

Carey cannot properly be read as petitioners urge. The Court in *Carey* embraced common-law principles in holding that plaintiffs in civil rights actions may not recover compensatory damages if they are unable to prove that they have been harmed by the unconstitutional conduct in issue. *See* 435 U.S. at 261-62. Likewise, the Court in *Carey* embraced common-law principles in holding that nominal damages should be awarded in cases where rights —such as procedural due process—are actionable even in the absence of actual injury. *Id.* at 266-67. Such a decision embracing common-law principles cannot reasonably be read simultaneously to reject other historic practices.

Contrary to the argument of petitioners and the ABA, neither *Carey* nor the common law hold that nominal damages are awarded as a means of compensating the plaintiff. *Carey* holds only that nominal damages should be awarded to recognize some constitutional rights. *See* 435 U.S. at 266. And the common law expressly holds that nominal damages are awarded "merely as a recognition of some breach of duty owed by defendant to plaintiff and not as a measure of recompense for loss or detriment sustained. . . . [As such, they] are in no sense compensatory, but merely symbolic." McCormick, *Handbook of the Law of Damages* at 85; *see also* Dan B. Dobbs, *Handbook on the Law of Remedies* at 191 (1973) (Nominal damages "are not aimed at compensation for harm done by the defendant's actionable conduct. In this sense they do

not represent 'damages' at all . . . [and are] not compensatory even in a limited sense.").

That a nominal damage award is not a means of compensating a plaintiff does not, of course, mean that such awards are necessarily insufficient ever to support "prevailing party" status. But where, as here, plaintiffs sought extensive monetary relief as compensation and failed to obtain any of it, they cannot properly be said to have "obtained some of the relief sought." *Garland*, 489 U.S. at 791. Indeed, to hold that a nominal damages award in a Section 1988 case is never a *de minimis* victory would render "the concept of de minimis relief meaningless. *Every* nominal damages award has as its basis a finding of liability, but obviously many such victories are Pyrrhic ones." *Lawrence v. Hinton*, 20 Fed. R. Serv. 3d at 937 (emphasis in original). As the Court of Appeals for the District of Columbia Circuit has stated, when "the net result achieved is so far from the position originally propounded . . . it would be stretching the imagination to consider the result a 'victory' in the sense of vindicating the rights of the fee claimants." *Commissioners Court of Medina County, Tex. v. United States*, 683 F.2d 435, 442-43 (D.C. Cir. 1982).

3. Petitioners and the ABA object (Pet. Br. 10-14; ABA Br. 2-4, 17-19) that, under this Court's decision in *Garland*, the relative success of the plaintiff is relevant only to the reasonableness of the amount of the fee awarded. But petitioners and the ABA misunderstand the Court's decision in *Garland*.

Garland expressly holds that, if success "on a legal claim can be characterized as purely technical or *de minimis*," it is "insufficient to support prevailing party status." 489 U.S. at 792. Thus, while *Garland* does state that "the degree of the plaintiff's overall success goes to the reasonableness of the award . . . , not to the availability of a fee award *vel non*," the decision qualifies that statement by

requiring that a "material alteration of the legal relationship of the parties" first be found to have occurred; and *Garland* makes it plain that the determination whether such a "material alteration" has occurred requires an evaluation of the "significance" of the plaintiff's success "in the context of th[e] litigation" as a whole. *Id.* at 793, 792.

Petitioners argue (Pet. Br. 13) that *Garland*'s reference to "technical" or "*de minimis*" successes refers only to situations where, as in *Garland*, an unconstitutional practice or policy has not been applied to the victorious plaintiff. But the discussion of "technical" or "*de minimis*" victories in *Garland* cannot be so limited to the facts of that case. The Court was discussing the general standard for identifying "prevailing parties." *See* 489 U.S. at 792-93. Moreover, while the practice at issue in *Garland* had not been applied to the victorious plaintiff, the characterization of the victory in that case as a "technical" or *de minimis* one turned on the insignificance of that victory in the context of the case as a whole. *Id.* Indeed, the Court cited (*id.*) with approval, as further examples of *de minimis* victories, cases that did not involve mere challenges to policies or practices that had not been applied and that, in fact, demonstrate that "prevailing party" status must be denied where the plaintiff fails to obtain a material aspect of the relief sought in the complaint (irrespective of whether a judgment is obtained). *See Chicano Police Officers Ass'n v. Stover*, 624 F.2d 127 (10th Cir. 1980) (nuisance settlement not sufficient to support "prevailing party" status); *New York City Unemployed and Welfare Council v. Brezenoff*, 742 F.2d at 724 n.4 (success on minor issue is not sufficient to support "prevailing party" status).

4. Petitioners and the ABA further argue (Pet. Br. 14-16; ABA Br. 11-17) that evaluating the significance of the plaintiff's success in the context of the entire relief sought in the litigation is inconsistent with *Garland*'s

rejection of the "central issue" test of "prevailing party" status. This argument is unfounded.

Contrary to the argument of petitioners and the ABA, the "central issue" test is not the same as the "*de minimis* success" test applied by the court below. The "central issue" test required an inquiry into the relative importance to the plaintiff of the various legal claims and prayers for relief in a case; under that test, in order to be a "prevailing party," the plaintiff had to prevail on the issue motivating a piece of litigation and obtain the "primary relief" sought. *Garland*, 489 U.S. at 787-88, 790-91. By contrast, the "*de minimis* success" test applied by the court below does not inquire into the relative importance to the plaintiff of the various legal claims and prayers for relief in a case; it inquires only whether the plaintiff has obtained some material aspect of the relief sought in the complaint.

Petitioners and the ABA are equally wrong in suggesting that the reasons given by the Court in *Garland* for rejecting the "central issue" test apply to the "*de minimis* success" test applied by the court below. As *Garland* itself concludes, congressional intent that a party need not prevail on all issues in order to obtain an award of attorney's fees has no application to a plaintiff who does not obtain anything more than "trivial success" on any issue in the case. 489 U.S. at 792-93; *accord Ruckelshaus v. Sierra Club*, 463 U.S. at 688 n.9. Moreover, in contrast to the "central issue" test, the "*de minimis* success" test does not render the availability of a fee award potentially dependent on the timing of a request for fees, since a fee award will be appropriate only after a plaintiff has obtained a non-technical victory on a significant issue in the litigation. Finally, in contrast to the "central issue" test, the "*de minimis* success" test does not focus on the mental state of the parties or promise to mire district courts in unmanageable inquiries; rather, the test focuses on the relief requested in the complaint and

simply requires the district court to determine whether the plaintiff has obtained a material aspect of it. *See* Fed. R. Civ. P. 8(a)(3) (requiring plain statement of relief requested); *see also Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 743 (1976).

Indeed, as the ABA inconsistently concedes (ABA Br. 19 n.12), "[u]nlike determining the 'central issue' or 'primary relief sought,' . . . assessing the degree of success in light of the entire litigation is a straightforward task that this Court has repeatedly entrusted to district courts." The Court has instructed district courts to give primary weight to the plaintiff's "degree of success" in setting the amount of a fee award. *See, e.g., Hensley*, 461 U.S. at 440; *Garland*, 489 U.S. at 789-90. There is no reason to believe that the courts will be unable manageably to conduct a similar, albeit less demanding, inquiry to assess whether plaintiffs have crossed the threshold for recovery of any attorney's fee award at all. In fact, as noted above (at 14-15, *supra*), the courts are already conducting this inquiry under Rule 54(d) in determining whether "costs" should be awarded to victorious plaintiffs.

5. Petitioners and the ABA further argue (Pet. Br. 5-7, 21-23; ABA Br. 1-2, 4-6) that a "*de minimis* success" test of this type is inconsistent with various indicators of congressional intent under Section 1988. But they are wrong in each respect.

Contrary to their argument, the "*de minimis* success" test is not inconsistent with congressional intent to attract counsel to civil rights cases where little or no damages are perceived as potentially recoverable. The "*de minimis* success" test applied by the court below does not require that a plaintiff recover extensive monetary relief in order to be treated as a "prevailing party"; indeed, it does not on its face preclude a plaintiff in an appropriate case from being a "prevailing party" upon recovery of a nomi-

nal damage award. It simply requires a plaintiff who seeks only extensive monetary relief to recover some material aspect of that relief in order to be treated as a "prevailing party." Such a rule should not in any way discourage lawyers from representing civil rights claimants in cases in which non-pecuniary rights are involved, or in which little or no damages are perceived as potentially recoverable. By definition, cases in which lawyers have satisfied themselves, pursuant to Federal Rule of Civil Procedure 11, that there is a reasonable basis for seeking extensive monetary relief are not cases in which only non-pecuniary rights are involved or in which little or no damages are perceived as potentially recoverable. *See Lewis v. Kendrick*, 944 F.2d at 956.

Likewise, contrary to the argument of petitioners, the "*de minimis* success" test is not inconsistent with congressional intent to restore civil rights attorney's fees law to its status prior to this Court's decision in *Alyeska*. While a number of courts prior to the *Alyeska* decision awarded costs and attorney's fees in cases in which nominal damages were recovered, petitioners do not suggest that those cases involved only requests for extensive monetary relief; and, in any event, as explained above (at 16-17, *supra*), other cases denied costs and attorney's fees where the relief awarded was *de minimis* in relation to the relief requested. The decision below is simply another in this part of the line of "restored" case law.

Finally, contrary to the argument of petitioners, Congress neither intended that civil rights plaintiffs would be treated the same as antitrust plaintiffs in all respects for purposes of attorney's fee awards nor understood that antitrust plaintiffs would receive attorney's fee awards for *de minimis* victories. While the legislative history of Section 1988 does indeed suggest that "the amount of fees awarded under [Section 1988 shall] be governed by the same standards which prevail in other types of equally

complex Federal litigation, such as anti-trust cases . . .," S. Rep. 1011, *supra* at 6, the statute makes it plain that the decision to award fees in civil rights cases is subject to equitable standards; in contrast, attorney's fee awards under the antitrust statutes are mandatory, are awarded only to plaintiffs, and are not subject to equitable constraints. *See Alyeska*, 421 U.S. at 261. Furthermore, while civil rights plaintiffs are entitled to an award of fees whenever they are "prevailing parties," antitrust plaintiffs are entitled to fee awards only when they "substantially prevail[]" (15 U.S.C. § 26) or are "injured in [their] business or property . . . ." (15 U.S.C. § 15). Thus, while a nominal damage award may in some circumstances entitle an antitrust plaintiff to an award of fees, it appears that it would do so less frequently than it would for a civil rights plaintiff (since the civil rights plaintiff need not "substantially" prevail or show injury to "business" or "property"). In all events, a nominal damages award would not appear to entitle an antitrust plaintiff to a fee award if it would only amount to a *de minimis* victory.

6. Petitioners finally argue (Pet. Br. 7-8, 25-29) that, since nominal damage awards have traditionally justified the shifting of costs, and since attorney's fees are treated as "costs" under Section 1988, nominal damage awards should justify the shifting of attorney's fees under Section 1988. As explained above (at 13-14, *supra*), however, while the common law in England treated nominal damage awards as sufficient to support shifting of costs, since 1670 both English and American courts and legislatures have developed contrary rules; indeed, as also explained above (at 14-15, *supra*), courts interpreting Rule 54 of the Federal Rules of Civil Procedure have consistently refused to shift even routine costs where, as here, the relief obtained is *de minimis* in relation to the relief sought. Moreover, while attorney's fees are treated as part of "costs" under Section 1988, the authorization for the shifting of attorney's fees is found in the separate "pre-

vailing party" standard of Section 1988; and courts have agreed that disposition of the issue of statutory costs does not necessarily control the award of fees under Section 1988. *See Fewquay v. Page*, 907 F.2d 1046 (11th Cir. 1990); *Chemical Mfrs. Ass'n v. EPA*, 885 F.2d 1276, 1278 (5th Cir. 1989); *Kelley v. Metropolitan County Bd. of Educ.*, 773 F.2d 677, 681 (6th Cir. 1985) (en banc), *cert. denied*, 474 U.S. 1083 (1986). In all events, when one considers "the historic principles of fee-shifting in this and other countries, . . . the conclusion that some success on the merits be obtained before a party becomes eligible for a fee award" necessarily follows, and a "trivial success" has never been sufficient. *Ruckelshaus v. Sierra Club*, 463 U.S. at 682, 688 & n.9. A nominal damage award in a case seeking $17 million in monetary relief is just such a "trivial success."

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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